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Nos. 08-217 & 08-218

IN THE

Supreme Court of the United States

MASSEY ENERGY COMPANY, *ET AL.*,
Petitioners,

v.

WHEELING PITTSBURGH STEEL CORP., *ET AL.*,
Respondents.

On Petitions for Writs of Certiorari to the Supreme Court of Appeals of West Virginia and the Circuit Court of Brooke County, West Virginia

BRIEF AMICUS CURIAE OF THE NATIONAL MINING ASSOCIATION IN SUPPORT OF PETITIONERS

KATIE SWEENEY
NATIONAL MINING ASSOCIATION
101 Constitution Ave., N.W.
Washington, D.C. 20001
(202) 463-2627

CATHERINE E. STETSON*
HOGAN & HARTSON LLP
555 Thirteenth St., N.W.
Washington, D.C. 20004
(202) 637-5491

*Counsel of Record

Counsel for Amicus Curiae

WILSON-EPES PRINTING CO., INC. - (202) 789-0096 - WASHINGTON, D. C. 20002

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BRIEF AMICUS CURIAE OF THE NATIONAL MINING ASSOCIATION IN SUPPORT OF PETITIONERS

STATEMENT OF INTEREST OF AMICUS CURIAE [1]

[1] Pursuant to this Court's Rule 37.2(a), *amicus* states that counsel of record for all parties received notice at least 10 days prior to the due date of *amicus*'s intention to file this brief. The parties have consented to the filing of this brief; copies of the consent letters have been filed with the Clerk. Pursuant to this Court's Rule 37.6, *amicus* further notes that no counsel for a party authored this brief in whole or in part, and no counsel made a monetary contribution intended to fund the preparation or submission of this brief.

The National Mining Association ("NMA") is a national trade association that represents all aspects of the mining industry, including producers of most of America's coal, metals, industrial and agricultural minerals; manufacturers of mining and mineral-processing machinery and supplies; bulk transporters; financial and engineering firms; and other businesses related to mining. The mining industry produces vital resources needed to fuel our economy and manufacture virtually all commodities sold in domestic and foreign markets. In 2005, the U.S. mining industry produced $78.4 billion of finished mineral, metal, and fuel products. These products were in turn used to create an additional $2 trillion worth of consumer and industrial goods. *See The Economic Contributions of the Mining Industry in 2005*, at 3 (2007).

The NMA works with Congress and regulatory officials to promote practices that foster the environmentally sound development and use of mineral resources. It also participates in litigation raising issues of concern to the mining community, *see, e.g.*, *National Mining Ass'n* v. *Fowler*, 324 F.3d 752 (D.C. Cir. 2003), and has been involved in cases, like this one, in which the Court is asked to review and decide nationally significant issues relating to due process and remedies. *See, e.g.*, *El Paso Nat. Gas Co.* v. *Neztsosie*, 526 U.S. 473 (1999) (relating to jurisdiction and remedies issues).

The NMA has a substantial interest in this case because many of its members have significant interests in the states of West Virginia and Virginia. West Virginia ranks second nationally in the production of coal, with over 161 million short tons pro-

duced in 2007.[2] Virginia's coal production exceeded 29 million short tons in 2007. And West Virginia and Virginia are the only two states in the Nation that do not afford an appeal as of right of punitive damages awards.

SUMMARY OF ARGUMENT

This Court for many years has found it necessary to admonish courts that they must provide "meaningful and adequate" review of punitive damage awards. *Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 20-21 (1991). The Court has explained, among other things, that a punitive damages award should be "reviewed by trial and appellate courts to ensure that it is reasonable." *Id.* at 15; *see also Honda Motor Co.* v. *Oberg*, 512 U.S. 415, 420-421 (1994); *TXO Prod. Corp.* v. *Alliance Resources Corp.*, 509 U.S. 443, 471 (1993) (Scalia, J., concurring) (noting that "'procedural due process' requires judicial review of punitive damages awards for reasonableness"). But reviewing an award for reasonableness begs the next question: reasonable as to what? As this Court observed just last Term, punitive awards must not only be reasonable in relation to compensatory awards; they must be reasonable in relation to *each other*, and in this respect punitive damages awards demonstrably often are not. *Exxon Shipping Co.* v. *Baker*, ___ U.S. ___, 128 S. Ct. 2605, 2625-27 (2008).

This Court does not sit to monitor on a case-by-case basis what it recently described as the "stark unpre-

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[2] A "short ton" is a unit of mass equal to 2,000 pounds; it is distinguished from the metric ton (1,000 kilograms) and the "long ton" (2,240 pounds).

dictability" of such awards. *Exxon*, 128 S. Ct. at 2625. Rather, it grants review where it determines that there is a broad and compelling interest in having the Court decide the issue presented therein. *See* S. Ct. Rule 10.

The federal and state appellate courts, on the other hand, are where errors in the trial process are *supposed* to be corrected. *Cf. Greenlaw* v. *United States*, ___ U.S. ___, 128 S. Ct. 2559, 2571 (2008) (Alito, J., dissenting) (urging the Court to "entrust the decision to initiate error correction to the sound discretion of the courts of appeals"). And where punitive damage awards are concerned, courts of appeals regularly find themselves in an error-correcting role. Punitive damages awards are modified or vacated in a *substantial* percentage of cases. Appellate review of damages awards furthers what this Court identified in *Exxon* as the goal that penalties be "reasonably predictable in [their] severity." 128 S. Ct. at 2627. That goal—predictability of outcomes—is a fundamental tenet of due process. It is achieved when appellate courts rigorously review jury awards. But rigorous appellate inquiry is nowhere to be found in West Virginia, whose unique judicial system couples discretionary appellate review with a notorious tolerance for colossal punitive damages awards. The petitions should be granted.

REASONS FOR GRANTING THE WRIT

APPELLATE REVIEW MATTERS.

A. Appellate Courts Vacate Or Modify Punitive Damages Awards In A Substantial Percentage Of Cases.

It is the purpose of the Due Process Clause to ensure "the fair and orderly administration of the laws." *International Shoe Co.* v. *Washington*, 326 U.S. 310, 319 (1945). One fundamental element of the law's "orderly administration," embedded in countless legal doctrines, is predictability: it is a central goal of the law that individuals and entities be able to understand the legal consequences of their conduct by reference to clear rules and the application of those rules to similar facts. As this Court explained years ago in *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 297 (1980), predictability in the legal system (in that case, notice of what conduct would and would not trigger personal jurisdiction over the person in state court) "allows potential defendants to structure their primary conduct with some minimum assurance" of the legal consequences of their actions. *See also Koon* v. *United States*, 518 U.S. 81, 113 (1996) (noting in the criminal context the need to "reduce unjustified disparities" in sentencing, "and so reach toward the even-handedness and neutrality that are the distinguishing marks of any principled system of justice").

In the same vein, just last Term in *Exxon Shipping Co.* v. *Baker*, ___ U.S. ___, 128 S. Ct. at 2625, this Court voiced dismay at what it called the "stark unpredictability of punitive awards." As it ex-

plained, data purporting to show a low "median ratio of punitive to compensatory awards" and empirical evidence that "punitive awards are infrequent" shed no light on the critical question of *consistency* across awards, *i.e.*, "whether the spread between high and low individual awards is acceptable. The available data suggest it is not." *Id.* After citing some of that data, the Court observed that fluctuations in punitive awards

> might be acceptable or even desirable if they resulted from judges' and juries' refining their judgments to reach a generally accepted optimal level of penalty and deterrence in cases involving a wide range of circumstances, while producing fairly consistent results in cases with similar facts. But anecdotal evidence suggests that nothing of the sort is going on. * * * We are aware of no scholarly work pointing to consistency across punitive awards in cases involving similar claims and circumstances. [*Id.* at 2625-26.][3]

This demonstrable lack of consistency across punitive damage awards for similar conduct mars the judicial system. Awards wholly out of scale with those approved in similar circumstances cast an "implication of unfairness" on the proceedings, to the

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[3] The Court also pointed to the Alabama Supreme Court's later-reversed decision in *BMW of North America, Inc.* v. *Gore*, in which the state court, confronted with two wildly different punitive damages verdicts (one $0 and one $4 million) in "strikingly similar" circumstances dismissively explained that the gross disparity between the two awards was merely " 'a reflection of the inherent uncertainty of the trial process.' " *Id.* at 2626 (citing and quoting *BMW of N. Am., Inc.* v. *Gore*, 646 So.2d 619, 626 (1994), *rev'd*, 517 U.S. 559 (1996)).

serious detriment of a system "whose commonly held notion of law rests on a sense of fairness in dealing with one another." *Id.* at 2627. Justice Holmes's hypothetical "bad man" and his counterparts all should face penalty schemes that produce "a fair probability of suffering in like degree when they wreak like damage." *Id.*

There are, of course, a few examples from this Court where large punitive damages awards are reduced after merits briefing and argument—the latest being *Exxon* itself. *See id.* at 2634 (vacating $2.5 billion judgment and remanding for court of appeals to remit punitive damages to $500 million, representing a 1:1 ratio of punitive to compensatory damages). *See also State Farm Mut. Auto Ins. Co.* v. *Campbell*, 538 U.S. 408 (2003); *BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559 (1996).

But as these very few decisions show, this Court's charge is not to sit as a court of error correction; the Court "rarely" grants certiorari "where the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." S. Ct. Rule 10. This Court takes up cases to articulate or explicate a legal rule; trial courts and courts of appeals apply those rules to each case's facts and circumstances. It accordingly falls to the lower appellate courts—which because they review multiple trial courts' rulings have the necessary vantage point for such work—to impose the "consistency" and "predictability" across damages awards this Court identified as a valued aspect of the judicial system. *See Exxon*, 128 S. Ct. at 2626 & n.17; *Honda Motor Co.*, 512 U.S. at 421 ("Judicial review of the size of punitive damages awards has been a safeguard

against excessive verdicts for as long as punitive damages has been awarded") (citing cases dating back to 1763); *see also Ornelas* v. *United States*, 517 U.S. 690, 697 (1996) (noting that "legal rules * * * acquire content only through application. Independent review is therefore necessary if appellate courts are to maintain control of, and to clarify, the legal principles.")

The "safeguard against excessive verdicts," *Honda Motor Co.*, 512 U.S. at 421, is often invoked and rigorously enforced at the appellate level—at least, by courts of appeals in 48 states and the District of Columbia. This Court observed as much in *Honda*, noting that "the most exhaustive study of punitive damages establishes that over half of punitive damages awards were appealed, and that more than half of those appealed resulted in reductions or reversals of the punitive damages." *Id.* at 433 n.11 (citing Michael L. Rustad, *In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes with Empirical Data*, 78 Iowa L. Rev. 1, 57 (1992)).[4] As

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[4] *See also, e.g.*, William M. Landes & Richard A. Posner, *New Light on Punitive Damages*, Regulation, Sept.–Oct. 1986, at 33 (noting that in a 1986 sample of federal product-liability cases, federal appellate courts reversed or remitted punitive awards in 7 of 10 cases); Ivy E. Broder, *Characteristics of Million Dollar Awards: Jury Verdicts and Final Disbursements*, 11 Just. Sys. J. 349, 353 (1986) (studying 198 high-dollar awards and finding that the jury award remained unmodified in only slightly more than one-quarter of cases); Mark Peterson, Syam Sarma & Michael Shanley, Inst. for Civ. Justice, R–3311–ICJ, *Punitive Damages: Empirical Findings* 30 (1987) (reporting findings that "most large punitive damages awards were reduced by post-trial activity"— based upon a survey of attorneys of record in 129 trials conducted between 1979 and 1983).

the same commentator the *Honda* Court cited approvingly noted several years later, in the years following *BMW*, the federal courts of appeals vacated or remitted punitive damages awards in eight out of eleven cases reviewed. *See* Michael L. Rustad, *Unraveling Punitive Damages: Current Data and Further Inquiry*, 1998 Wisc. L. Rev. 1, 14 (1998).[5]

When the courts of appeals take up and (often) reverse, reduce, or modify punitive damages awards, they naturally look to this Court for guidance on the parameters to apply to test the awards' reasonableness.[6] But when it comes to putting those constitu-

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[5] More recent studies similarly conclude that jury punitive damages awards are more often than not reduced by trial or appellate courts on post-verdict review. *See, e.g.*, U.S. Dep't of Justice, Bureau of Justice Statistics, *Punitive Damage Awards in Large Counties*, 2001 (March 2005) (noting that over half of punitive damage awards were modified after verdict); Michael L. Rustad, *The Closing of Punitive Damages' Iron Case*, 38 Loy. L.A. L. Rev. 1297, 1329-34 (2005) (examining state-court review of the excessiveness of punitive damage awards); *see also* Tamara Loomis, *Punitive Damages; Practical Impact of High Court Decision Is Disputed*, 225 N.Y.L.J. 5 (2001) (reporting that of 29 high-dollar punitive damages verdicts in 1994, ten were reversed and another ten were severely reduced).

[6] Courts of appeals also regularly reverse outright punitive damages awards because of fundamental legal, evidentiary, or instructional deficiencies in the trial process. *See, e.g., White* v. *Ford Motor Co.*, 500 F.3d 963, 972 (9th Cir. 2007) (reversing and remanding for new trial on punitive damages because of instructional error); *Exxon Mobil Corp.* v. *Alabama Dep't of Conservation & Nat. Res.*, 986 So. 2d 1093, 1117-18 (Ala. 2007) (reversing $3.5 billion punitive damages award on the ground that no fraud had been proven); *Ciba-Geigy, Inc.* v. *Murphree*, 653 So.2d 857, 867 (Miss. 1994) (reversing $500,000 punitive damages award on ground that "[t]here is nothing alleged that could lead to" the imposition of punitive damages). The appellate courts' function thus is not just to ensure regularity across

tional parameters to practice and determining whether a particular award is "reasonable" in the circumstances, appellate courts look to other cases presenting similar circumstances in order to further predictability and consistency across outcomes. *See Exxon*, 128 S. Ct. at 2625-26.

In *JCB, Inc.* v. *Union Planters Bank, NA*, ___ F.3d ___, 2008 WL 3897384 (8th Cir. Aug. 26, 2008), for example, a jury awarded over a million dollars in punitive damages on a single trespass claim resulting from a repossession, and the district court refused to modify or remit the award. Examining, among other things, other cases comparable to the claim on review, the court of appeals concluded that the punitive award on the trespass claim was "beyond what due process will permit." *Id.*, 2008 WL 3897384, at *10. As it explained, the highest punitive damages award it could find "in a comparable Missouri case" was substantially lower than the jury's million-dollar award, and the award in the comparator case was rendered on claims that covered both trespass and conversion. *Id.* (citing *Perkins* v. *Dean Mach. Co.*, 211 S.W.3d 148 (Mo. Ct. App. 2007)). The Eighth Circuit ultimately cut back the jury's punitive damages award to one-tenth the original amount. *Id.*

In *Bridgeport Music, Inc.* v. *Justin Combs Publishing*, 507 F.3d 470 (6th Cir. 2007), *petition for cert. filed*, 76 U.S.L.W. 3630 (U.S. May 19, 2008) (No. 07-1438), a jury had found the defendants liable for copyright infringement after they released a song

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verdicts; it is to ensure that the verdicts were justly rendered in the first place.

containing an unlicensed sample. The jury awarded a total of $3.5 million dollars in punitive damages, and the district court declined to modify or remit the punitives award. *Id.* at 477-478. On appeal, the Sixth Circuit concluded that the punitive award was unconstitutionally excessive: defendants' copyright violations were "not so reprehensible as to justify" an award of that magnitude, the plaintiff was not financially vulnerable, and there was no evidence that the infringing action was part of a pattern of misconduct.[7] *Id.* at 487-488.

The court reached that conclusion by reference to, among other things, earlier decisions of its own and from other circuits. The court of appeals explained that it previously had held in a case also presenting only one "reprehensibility factor[ ]" that a 2:1 or 1:1 ratio of punitives-to-compensatory damages was permissible. *Id.* (citing *Clark* v. *Chrysler Corp.*, 436 F.3d 594, 601, 613-614 (6th Cir. 2006)). And the court had held in another appeal that a 1:1 ratio of punitives to compensatories was appropriate where only one "reprehensibility factor" was present. *Id.* at 488 (citing *Bach* v. *First Union Nat'l Bank*, 486 F.3d 150, 154-156 (6th Cir. 2007)).

The court of appeals also looked outside its own jurisdiction to the Eighth Circuit, which similarly had concluded that a 1:1 ratio "was appropriate where the compensatory damages award was large and the defendant's conduct was more reprehensible

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[7] The court of appeals also concluded that the jury mistakenly had included compounded prejudgment interest in its compensatory damages award—a mistake the district court also had failed to correct. *Id.* at 484-485.

than in this case." *Id.* (citing *Williams* v. *ConAgra Poultry Co.*, 378 F.3d 790, 792-793 (8th Cir. 2004)).

The Sixth Circuit engaged in a similar inquiry when it came time to assess the ratio between compensatory and punitive damages in the case: after acknowledging this Court's instruction on the issue, *id.* (citing, inter alia, *State Farm*, 538 U.S. at 425), the court of appeals again returned to its prior precedents and determined that the ratio of awards in the case was intolerably high. *Id.* at 488-489 (citing *Bach*, 486 F.3d at 156-157, and *Pollard* v. *E.I. DuPont De Nemours, Inc.*, 412 F.3d 657, 666-668 (6th Cir. 2005)). *See also, e.g.*, *DiSorbo* v. *Hoy*, 343 F.3d 172, 188 (2d Cir. 2003) (reducing punitive damages award in police-misconduct case after "assess[ing] such awards in other police misconduct cases"); *Kimzey* v. *Wal-Mart Stores, Inc.*, 107 F.3d 568, 577 (8th Cir. 1997) (reducing $5,000,000 award to $350,000 after "considering awards in similar cases"); *Lee* v. *Edwards*, 101 F.3d 805, 812 (2d Cir. 1996) (remitting $200,000 punitives award to $75,000 after "examin[ing] punitive damage awards in similar cases"); *Continental Trend Res., Inc.* v. *Oxy USA Inc.*, 101 F.3d 634, 641 (10th Cir. 1996) (examining awards from other states to conclude that defendant was sufficiently on notice of the possibility of a large punitive award, but remitting the jury's $30,000,000 award to $6 million).

State appellate decisions are the same. In *Burlington Northern Railroad Co.* v. *Whitt*, 575 So.2d 1011 (Ala. 1990), for example, a railroad challenged as unconstitutionally excessive a $15 million punitive damages jury award that the trial court on post-trial motions had refused to reduce. The Alabama Su-

preme Court remitted the award to $5 million after "having compared verdicts in similar cases that have come to this Court." *Id.* at 1024. The court observed that it was the "only appellate court with the ability to assure some degree of uniformity in the area of punitive awards," and it thus fell to that court to "determine whether the award is excessive when compared to awards in similar cases." *Id.*

The Supreme Court of Illinois embraced the same approach in *International Union of Operating Engineers, Local 150* v. *Lowe Excavating Co.*, 870 N.E.2d 303, 322 (Ill. 2006), when it took up a defendant's appeal of a $325,000 punitive damages award in a union lawsuit. "In our estimation," the court explained, "the best way to determine whether a given ratio is appropriate is to compare it to punitive damages awards in other, similar cases." The plaintiffs in that case had cited several earlier decisions in support of the substantial punitive damages verdict there; but the Supreme Court found those cases distinguishable in kind and degree. *Id.* at 322. After identifying other, more factually similar cases that "provide[d] some guidance on the issue," the court concluded that the $325,000 award was far in excess of that awarded in similar cases, and that a $50,000 award was reasonable. *Id.* at 323-324. *See also Gehrett* v. *Chrysler Corp.*, 882 N.E.2d 1102, 1120-22 (Ill. App. Ct. 2008) (thoroughly reviewing cases from Illinois, the Seventh Circuit, and other courts of appeals that previously had addressed punitive damages in similar factual contexts and ultimately directing a substantial remittitur of punitives).

JCB, *Bridgeport*, *Burlington Northern*, *Lowe*, and other appellate decisions like them demonstrate the

utility—indeed, the necessity—of appellate review of punitive damage awards to maintain some degree of consistency and predictability across the judicial system. Federal and state appellate courts take direction from this Court on the constitutional boundaries of a punitive damages award. They apply those teachings—and ensure some degree of consistency among awards in similar cases—by seeking guidance in turn from other cases in their own or other appellate courts presenting similar fact patterns. A jury in an individual case, of course, is not privy to that systemwide knowledge. And busy trial courts reviewing jury verdicts may or may not be fully apprised of the range of verdicts upheld (or not) in similar circumstances in their home or a sister state. It falls to the appellate courts in their oversight role to ensure that the orderly administration of justice produces reasonably predictable outcomes in high-dollar cases. And in West Virginia, that oversight is for all practical purposes nonexistent.

B. The Supreme Court Of West Virginia's System Of Discretionary Review Fails To Provide Sufficient Meaningful Appellate Review Of Punitive Damages Awards.

The Supreme Court of West Virginia's "appellate jurisdiction is entirely discretionary. It may either grant or refuse review of any case." Supreme Court of West Virginia website, *available at* http://www.state.wv.us/wvsca/Supreme.htm (last accessed Sept. 19, 2008). Review is refused far more often than it is granted; the most recent statistics available from that court show that its overall petition grant rate is eleven percent. *See* West Virginia Supreme Court of

Appeals 2006 Annual Report, *available at* http://www.state.wv.us/wvsca/2006 Stats.pdf.

Despite the relative stinginess of its grants, the Supreme Court's role includes that of being a court of error: its rules direct petitioning parties to enumerate the "assignments of error relied upon on appeal," W. Va. S. Ct. R. 3(c)(4), and further review will be denied if the Court in its limited inquiry at the petition stage concludes that the trial court's decision was "plainly right." *Id.* R. 7(a). But the West Virginia Supreme Court's eleven-percent grant rate pales in comparison to the proven *error* rate of punitive damages awards; study after study has demonstrated that courts reviewing punitive damages awards modify or overturn those awards over half the time. *See supra* at 8-9.

Unless West Virginia's trial-court decisions are orders of magnitude more accurate than those rendered by its sister-state courts, therefore, errors are left unremedied at the West Virginia Supreme Court. The result: some of the largest punitive damages awards in the Nation are left unexamined by any appellate court for their reasonableness in relation to other awards rendered in like circumstances. This is not due process; it is a lottery. The Alabama Supreme Court in *Gore* chalked up gross disparities among verdicts in that state to the inherent "uncertainty" of the trial system—an assertion this Court made short work of on merits review. This Court similarly should grant review of these petitions, conclude that due process requires more than West Virginia gives, and reverse.

CONCLUSION

For the foregoing reasons, and those in the petitions, the petitions for writs of certiorari should be granted.

Respectfully submitted,

KATIE SWEENEY
NATIONAL MINING ASSOCIATION
101 Constitution Ave., N.W.
Washington, D.C. 20001
(202) 463-2627

CATHERINE E. STETSON*
HOGAN & HARTSON LLP
555 Thirteenth St., N.W.
Washington, D.C. 20004
(202) 637-5491

*Counsel of Record

Counsel for Amicus Curiae